LIM KENG SIONG & ANOR.

v.

YEO AH TEE

FEDERAL COURT, KUALA LUMPUR
SALLEH ABAS CJ (Malaya)
ABDUL HAMID OMAR FJ
GEORGE SEAH FJ
[CIVIL APPEAL NO. 164 OF 1982]
21 MARCH 1983

CONTRACT: *Sale of land - Specific performance - Whether sale subject to contract - Whether negotiations concluded.*

EVIDENCE: *Affidavit to consolidate of actions - Whether admissible.*

The appellants agreed to sell the land, the subject matter of the dispute, to the respondent, by a letter dated 1 March 1976, subject to contract, which letter was followed by another, dated 3 March 1976. The respondent alleged that the second letter concluded the negotiations and confirmed the sale. On the other hand, the appellants did not deny certain averments made by the respondent, including the averment that the respondent had duly paid the deposit agreed upon and duly executed copies of the amended agreement. They however contended that the sale was subject to contract. They denied signing and delivering the contract of sale to the respondent or that they had neglected or refused to take further steps to conclude the agreement.

Held:

[1] There was hardly any substance in the appellants' denial that they had not neglected, refused and continued to neglect and refuse to take any further steps towards the completion of the agreement of sale.

[2] The letter dated 1 March 1976 was not relied upon by the respondent as being the date on which the contract was concluded and the trial Judge by referring to the letter had done so mainly to support his finding that the appellants had in fact a firm intention to sell the said land at the price quoted subject to contract.

[3] The pleadings of the respondent were defective but any defect in the pleadings would seem to relate only to form and not substance.

[4] The affidavit and the documents exhibited to the affidavit in an application by the appellants to consolidate the present suit with other suit were clearly admissible in the present proceedings. There was no reason why the trial Judge should have been precluded from looking at the affidavit. [*Palaniappa Chettiar v. Tan Sun & Anor.* [1965] 1 MLJ 182].

[5] Time was no longer of the essence of the contract and the appellants were not entitled to abandon the contract because of the short period arbitrarily imposed for the return of the contract and the failure to notify the respondents of their intention to abandon the contract. [*Wong Kup Sing v. Jeram Rubber Estates Ltd.* [1969] 1 MLJ 245].

[6] A legally binding and enforceable agreement was concluded on 3 March 1976. The letter of 1 March 1976, might well have been a starting point leading to the further events that followed. At the most, the term "subject to contract" in that letter was no more than a mere expression of desire of the parties as to the manner in which the transaction already agreed

to would in fact go through. [*Von Hatzfeldt - Wildenburg v. Alexander* [1912] 1 Ch 284; *Masters v. Cameron* (91 CLR 353); *Daiman Development Sdn. Bhd. v. Matthew Lui Chin Teck* [1981] 1 MLJ 58]. A formal contract was not a condition. [*Bondwell v. Jenkins* [1878] Ch D Vol 8; *Bolton Partners v. Lambert* Vol 41 Ch D 295; *Shankarlal Narayandas Mundade v. New Mofussil Co. Ltd.* [1945] Vol 73 - The Law Reps. Indian Appeals p. 98; *Griffiths v. Young* [1970] 1 Ch 675; *Godecke & Anor. v. Kirwan* [1973] 1 Australia Law Rep 457; *Daiman Development Sdn. Bhd. v. Matthew Lui Chin Teck & Anor.* [1981] 1 MLJ 56; Harichand v. Govind [1923] AIR PC 47].

[Appeal dismissed.]

Cases referred to:
Palaniappa Chettiar v. Tan Sun & Anor. [1965] 1 MLJ 182
Wong Kup Sing v. Jeram Rubber Estates Ltd. [1969] 1 MLJ 245
Von Hatzfeldt-Wildenburg v. Alexander [1912] 1 Ch 284
Bondwell v. Jenkins [1878] Ch D Vol 8
Bolton Partners v. Lambert Vol 41 Ch D 295
Griffiths v. Young [1970] 1 Ch 675
Godecke & Anor. v. Kirwan [1973] 1 Aus Rep 457
Daiman Development Sdn. Bhd. v. Matthew Lui Chin Teck & Anor. [1981] 1 MLJ 56
Harichand v. Govind [1923] AIR PC 47

For the appellants - P. Cumaraswamy
For the respondent - Cecil Abraham (Thara Singh Sidhu and Ting Poi Tek with him); M/s. Ting Poi Tek & Co.

JUDGMENT

Abdul Hamid Omar FJ:

The appeal is against the decision of Wan Yahaya J given at Malacca on 5 June 1982 ordering that the agreement of sale of a piece of land known as Holding No. 689 Mukim Balai Panjang held under SLG. No. 969/61 together with factory erected thereon known as No. 5369-C, Jalan Malim, Malacca (the said land) be specifically performed and carried into execution.

There is an alternative order for rescission of contract should the above order be incapable of performance. We do not see any necessity to deal with it at this point and would only do so if and when the need arises.

The facts are not substantially in dispute. The appellants intended to sell the said land as indicated in their letter of 14 December 1974 addressed to Melaka Branch of CH. Williams, Talhar & Wong Sdn. We mention this not to show any special significance that we attach to it but merely to highlight the fact that this intention to sell was revived as is revealed from the appellants' letter of 1 March 1976, para. 2 of which reads -

> I confirm, subject to contract, that the lowest price I am willing to sell the said property is $5.40 per square foot in Singapore currency, the sale and purchase to be completed latest by 24 March 1976. Ten per cent deposit to be paid within the course of the next few days if your buyer Mr. Yeo Ah Tee agrees to the price and terms.

At this point there was conceivably no question of any concluded contract. The respondent Yeo Ah Tee also had not so alleged. What is alleged is that the appellants had negotiated the sale through Messrs. C.H. Williams, Talhar & Wong Sdn. and the negotiation was concluded on 3 March 1976. Messrs. CH. Williams, Talhar & Wong Sdn. by letter of 3 March 1976 confirmed the sale. Since the contents of this letter seem pertinent to the determination of this appeal, we deem it appropriate to reproduce it in full as follows:

CH. Williams, Talhar & Wong Sdn.

3 March 1976.

Messrs. Gim Cheong & Co.,
17, Beach Road,
Singapore 7.

Kind Attention: Mr. Lim Keng Siong

Dear Sir,

Re: Purchase of Property Lot 689,
Mukim of Balai Panjang,
Melaka.

We refer to our telephone conversation this afternoon in which you have kindly accepted our client's (Mr. Yeo Ah Tee) further offer regarding the above, with vacant possession at a price of RM5.20 per square foot for RM454,391.60 cents. Ringgit: Four hundred and fifty four thousand three hundred and ninety one dollars and cents sixty only. The sale is to include all buildings, plant and machinery and all ancillary facilities etc.

We have received further instructions to inform you that our client has appointed Messrs. Ting Poi Tek & Co. of 30, Jalan Laksamana as his solicitors to deal with all legal matters pertaining to the above sale.

Messrs. Ting Poi Tek & Co. will communicate direct with you regarding the sale.

Yours faithfully,

sgd.?

cc. KL. Office
cc. Messrs. Ting Poi Tek & Co.

The averment which alleges that there was a concluded contract is to be found in para. 3(a) of the respondent's statement of claim. This is specifically admitted by the appellants in para. 1 of their statement of defence. The appellants also admit the following averments in the statement of claim -

3 (b). The 10% deposit amounting to RM45,400 approximately was sent by the plaintiff's solicitors Messrs. Ting Poi Tek & Co. by Express Mail on 5 March 1976 enclosing therein the draft agreement for the defendants' solicitors' approval the receipt of which was acknowledge on 9 March 1976.

3 (c). The defendants through their said solicitors by letter dated 22 March 1976 to the plaintiff's solicitors had stated and enclosed the following:

(1) Two title deeds relating to the property on the usual undertaking. Kindly sign and return to us one copy of the enclosed Schedule of Deeds.

(2) One copy of your draft Contract showing the amendments made by us.

(3) Engrossments in triplicate of the said Contract for signature by your client if our amendments to the original draft are in order.

(4) Photostat copy of the search of the property made in July 1975

(5) Photostat copy of the 1975 Quit Rent receipt.

We would like to draw your attention to the following:

(a) The area of the property is 2 acres 0 rood 01 pole equivalent to 87392 square feet (and not 87, 383 and the purchase price calculated at the rate of RM5.20 per square foot) on the correct area.

(b) Our clients require the deposit to be 20% of the purchase price.

(c) Our clients require the binding Contract herein to be entered into and the remaining deposit of RM45,447.68 (by Telegraphic Transfer) to be forwarded to us by the 31st instant failing which the negotiation for the sale and purchase herein will be treated as abortive.

1. By an agreement made between the plaintiff and the defendants, the defendants agreed to sell and the plaintiff agreed to buy certain property situated at the Mukim of Balai Panjang, Melaka Tengah known as Holding No. 689 and held under SLG. No. 969/61 with factory building erected thereon and also known as No. 5369-C, Jalan Malim, Malacca and the plant and machinery therein at the price of RM454,438.40.

2. It was further provided by the said Agreement that the plaintiff should pay a deposit of RM90,887.68 in respect of the said purchase price. The plaintiff duly paid the said sum on 20 March 1976 and the receipt thereof was acknowledged on 2 April 1976 by letter from the defendants' solicitors Messrs. Chan, Goh & Co. of Singapore.

4. The plaintiff duly executed the engrossed copies of the amended agreement and duly sent the remaining deposit of RM45, 447.68 by bank draft the receipt of both of which was acknowledged by letter dated 2 April 1976.

6. The said agreement provides for specific performance under clause 8 thereof.

These averments set out in full bear out the facts not disputed by the appellants and they help to narrow down the issues the learned Judge was called upon to determine. The picture that emerges from the pleadings this far would not, in our view, be complete if we do not state the appellants' contentions.

First, they say the sale was subject to contract, i.e., the agreement to sell the said land was not binding until they signed and delivered the contract to the respondent.

Second, they deny signing or delivering the contract to the respondent. On 14 May 1976, their solicitors informed the respondent's solicitors that they did not wish to sell the property concerned.

Third, they denied paras. 5, 7 and 8 of the statement of claim which read -

5. By the re-negotiation of the sale through their solicitors and requesting for a 20% deposit to be sent before 31 March 1976 after all the terms have been settled by the defendants' solicitors and requiring the plaintiff to execute the agreement as contained in the aforesaid letter, the plaintiff had concluded an enforceable agreement of sale.

7. Notwithstanding repeated requests by the plaintiff the defendants have neglected and refused and continue to neglect and refuse to take any further steps towards the completion of the said agreement of sale.

8. The plaintiff has at all material times been and is now ready and willing to perform his obligations under the said agreement.

In our view, the appellants' denial have no merit. It is only that part of para. 5 of the statement of claim where the appellants contend the word "renegotiation" supports their defence that there was no concluded and enforceable agreement of sale which calls for consideration. We shall deal with this shortly.

We also see no merit in the denial of paras. 7 and 8 of the statement of claim. There is hardly any substance in the appellants' contention that the respondent had not made repeated requests and that they (appellants) had not neglected, refused and continued to neglect and refuse to take any further steps towards the completion of the said agreement of sale. These denials are not borne out by the evidence produced before the learned Judge. In fact there is to be found in the judgment of the learned Judge to the effect that the respondent's solicitors wrote to the appellants requesting them to expedite the execution of the agreement. This was followed by another letter (10 May 1976) in a stronger term asking for the purchase to be completed under threat of legal action but the appellants merely answered "The sale is abortive. Your client may do as he pleases." By the same token it cannot, in our view, be even suggested that the respondent had not at all material times been ready and willing to perform his obligations under the agreement.

At the hearing before us Mr. Cumaraswamy Counsel for the appellants submitted what appears to us to be his main ground of appeal that the learned trial Judge erred in holding that IDI with reference to the clause "subject to contract" did not form a condition or term of the bargain. As this appears to be the only substantial ground relied upon by the appellants, we shall consider it after we dispose the other grounds of appeal.

Grounds 1, 2 and 3 in the memorandum of appeal are taken together, the first deals with the appellants' contention that the learned Judge had erred both in law and in fact in finding that they had intended to conclude the contract and create a binding legal obligation to sell the land on 1 March 1976. Our attention is directed to paras. 5 and 1 of the respondent's statement of claim which, according to the appellants, are crucial as they form the basis of the respondent's case that an enforceable agreement was only concluded sometime on 29 March 1976. And the learned Judge failed to direct his mind to these averments, instead two dates, 1 & 3 March 1976 which were untenable. It is pointed out that according to PW1's own testimony the sale was still negotiated even after 5 March 1976. It is also pointed that the last para of the letter from the respondent's solicitors sent to the appellants' solicitors forwarding the draft agreement for approval and execution clearly shows that execution became an important element. It is argued that the payment of an additional deposit confirms that by 5 March 1976 there had not yet been a concluded contract.

With respect we cannot accept. There is clearly emerged from the pleadings that 1 March 1976 is not the date relied upon by the respondent as being the date on which the contract was concluded. We cannot conceivably draw from the appellants' letter of 1 March 1976 something more than an expression of a firm intention on the part of the appellants to sell the said land. What transpired thereafter was that pursuant to the letter PW2, an estate valuer of CH. Williams, acting on behalf of the respondent, negotiated for the purchase of the said land at RM5.20 per sq. ft., and a definite agreement was secured from the appellants for the sale of the said land. Hence the letter of 3 March 1976 followed by the letter of 5 March 1976 in the latter case from the respondent's solicitors to the appellants' solicitors confirming the sale of the said land.

The learned Judge did refer to the letter of 1 March 1976 in the course of his judgment but what seems apparent to us is that the learned Judge was in this regard referring specifically to this letter mainly to support his finding that the appellants had in fact a firm intention to sell the said land at the price quoted subject to contract. We are unable to discern any error

of either law or fact on the part of the learned Judge for it is clear that the learned Judge fully appreciated that the only issue to be considered was whether there was in fact and in law a concluded contract of sale between the parties on 3 March 1976. He properly considered the issue and gave his reasons at pp. 7 to 15 of his judgment before making a finding that there clearly existed the intention of the parties to conclude a contract on 3 March 1976 when the appellants agreed orally to the offer made by Mr. Chan on behalf of the respondent.

The next question is: was there a specific allegation by the respondent that there was a concluded contract on 3 March 1976. There was: it is set out in para. 3(a) of the statement of claim Mr. Abraham Counsel for the respondent does not deny that the way the pleadings have been drawn up has left much to be desired. We think so, too, however, any defect would seem to relate only to form and not substance. Ideally para. 3(a) ought to have come first, i.e. before para. 1 of the statement of claim in which event the issue that the learned Judge viewed to be the real issue for him to determine would have clearly and unmistakably emerged. The question of negotiation or renegotiation plainly did not arise. There was indeed disclosed some sort of a departure from the terms in particular with regard to the additional deposit required by the appellants but that was brought about solely by and at the instance of the appellants. There was nothing to show that at any time the respondent departed from any of the terms originally agreed. The only matter outstanding to complete the deal, in so far as the respondent was concerned, was the formal execution of the agreement.

One of the other grounds advanced by the appellants is that the learned Judge erred in law in admitting the respondent's affidavit in an application for consolidation of Malacca High Court Civil Suit No. 157 of 1978 and the present suit. It is submitted that in admitting this affidavit evidence prejudicial to the appellants was thus admitted. We see no substance in the submission. The affidavit in question was an affidavit connected with this suit and filed by the appellants in an application to consolidate this suit with another suit. The learned Judge rejected the application but nevertheless admitted the affidavit, to be precise, the documents exhibited to the affidavit stating that

> an application for consolidation of the two suits refers to the proceedings common to both the suits and would therefore form part of the proceedings in both suits. The documents exhibited to an affidavit form as much part of the affidavit as if they have been actually annexed to and filed with it - see *Palaniappa Chettiar v. Tan Sun & Anor*. [1965] 1 MLJ 182. Thus they are clearly admissible in the present proceedings.

We hardly see any fault in that and we cannot see why the Judge should be precluded from looking at the affidavit. There was also nothing prejudicial to the appellants. The averments in the affidavit do not substantially differ from the undisputed facts already before the Judge. This is evident from the finding made by the Judge when he said

> The above written statments also convey to my mind the unmistakable intention of the defendants to treat the oral agreement made on 3 March 1976 as a concluded contract.

Counsel for the appellants argues that *Palaniappa Chettiar's* case is distinguishable. We do not see any significant distinction. *Palaniappa Chettiar's* case is in effect an authority for the proposition that "exhibits to an affidavit formed part of the affidavit as if they had been copied out in the affidavit ..." Since the documents were in fact attached to the affidavit, we see no reason to hold that the learned Judge was disentitled to look at the affidavit and the documents annexed to it.

Grounds 8 and 9 have not been vigorously pursued by the appellants. In any event we hardly think they merit detailed examination. It is to be observed however that ground 9 is basically directed to a question of fact. Although the question of consturuction may well be a question of law, much we think depends on a finding of fact arrived at by the learned Judge after considering the circumstances surrounding the particular case.

The learned Judge found that time was no longer of the essence of the contract and the appellants were disentitled to abandon the contract because of the short period arbitrarily imposed on the return of the contract and the failure to notify the respondent of their intention to abandon it. Against this the appellants contend that it is against the weight of evidence. We are satisfied that it is not. There is abundance of evidence for the learned Judge to make such a finding.

The learned Judge followed *Wong Kup Sing v. Jeram Rubber Estates Ltd.* [1969] 1 MLJ 245. The facts of that case are not on all fours with the facts of the present case. Nevertheless we form the view that *the ratio decidendi* in that case is applicable to the present case.

Now the only question we should perhaps draw our attention to is the meaning of the term "subject to contract."

It seems appropriate to reiterate that the averment that the contract was concluded on 3 March 1976 was specifically admitted by the appellants. We appreciate, nonetheless, that the appellants qualified by saying that the contract was subject to contract meaning, we surmise, subject to further terms to be negotiated and formal agreement to be executed. If indeed that were the contention then the first question that calls for determination is whether there were other terms that had to be negotiated? The further question is whether there was any outstanding condition agreed upon by the respondent that he failed to fulfil.

The incontrovertible facts which gave rise to the findings made by the learned Judge show very clearly that all the terms and conditions of sale necessary to conclude a contract had been agreed upon by the parties of 3 March 1976. There was no stipulation that the contract was not to be binding until execution of a formal contract, indeed to make the formal execution of the contract an essential condition for its conclusion.

The words "subject to contract" have surfaced in the course of the proceedings before the learned Judge from a letter sent by the appellants to Melaka Branch of CH. Williams, Talhar & Wong Sdn., but the letter itself was not a proved exhibit before the Court even though they sought to rely on this so called essential condition.

Mr. Abraham adopts two lines of arguments - first: cases on "subject to contract" relied upon by the appellants are not applicable to the present appeal for reasons -

(a) that the letter of 1 March 1976 did not form part of the evidence as it was not tendered as an exhibit; it was from the appellants to the estate agent and it was not from the respondent to the appellants;

(b) the agreed sale price concluded on 3 March 1976 was different from the sale price quoted in the letter. The purported term or condition, if any, which the appellants want it to be read as containing in the phrase "subject to contract" cannot be introduced in a subsequent event;

(c) the rejection by the learned Judge of the view advanced by the appellants to the effect that the term "subject to contract" indicated that the appellants did not intend to conclude the contract until the execution of the proper documents and that this letter formed part of the transaction and the term should be read with and into the terms of the other letters as well as the respondent's pleadings.

There is substance in the argument. The letter of 1 March 1976 may well have been a starting point leading to the further events that followed. Too much cannot, we think, be read into the letter other than an expression by the appellants to sell the said land at the price quoted subject of course to a contract to be concluded. It makes sense because no negotation had yet taken place. It was otherwise after Mr. Chan (PW2) had, pursuant to a negotation with the appellants on 3 March 1976 secured the agreement of the appellants to sell the said land on terms orally agreed between them.

The second, in fact, the main line of the respondent's argument is that the position of the parties falls into the second category of the exposition given by Mr. Justice Parker in *Von Hatzfeldt-Wildenburg v. Alexander* [1912] 1 Ch 284 at pp. 288-289 where it stated -

> It appears to be well settled by the authorities that if the documents or letters relied as constituting a contract contemplates the execution of a further contract between the parties it is a question of construction whether the execution of the further contract is a **condition** or **term** of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case, there is no enforceable contract because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case, there is a binding contract and reference to the more formal document may be ignored.

By the second category the respondent is in effect saying that phrase in the letter of 1 March 1976 relied upon by the appellants as constituting or forming part of a contract contemplating the execution of a further contract should fundamentally be construed as a mere expression of the parties as to the manner in which the transaction already agreed to should in fact go through and not as a condition or term of the bargain. Thus it is submitted that reference to the execution of a formal document can, in the circumstances of the present appeal, be ignored.

Here again we choose to hold that for the appellants to rely on formal execution of a contract as an essential condition of the bargain it certainly cannot be founded on the basis of the letter of 1 March 1976 but fundamentally on a finding of fact, if any, that in the circumstances of this case it was indeed a condition or term of the contract. No such finding was made by the learned Judge and we see nothing to contradict that finding. Even assuming for a moment that term "subject to contract" as contained in the appellants' letter of 3 March 1976, we see no reason to construe the phrase as anything more than, to borrow the words used in *Von Hatzfeldt-Wildenburg's* case, "a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through." We refer to and respectfully agree with the exposition of the principle in *Masters v. Cameron* 91 CLR. 353 cited with approval in *Daiman Development Sdn. Bhd. v. Matthew Lui Chin Teck* [1981] 1 MLJ 58.

The weaknesses of the appellants' case are, in our view, exposed by the events that followed begining from the letter sent by CH. Williams dated 3 March 1976 and the further letter from the respondent's solicitors to the appellants' solicitors confirming the essential terms of the oral contract concluded on 3 March 1976 in respect of which no disagreement whatsoever was raised by the appellants until 22 March 1976 when out of the blue they asked for a 20% instead of 10% agreed earlier and further asked that the remaining deposit of RM45,447.68 be forwarded by 31 March 1976 in order to enter into a binding contract failing which the negotation for the sale and purchase would be treated as abortive. Even though this was a departure from the term agreed upon by the parties the respondent nevertheless within a reasonable time, complied with the request. What clearly emerges from the appellants' letter of 22 March 1976 was that not only there was a depature from one of the terms of the

concluded contract but also an imposition by the appellants of arbitrary short period for the respondent to comply. In our view, there was a reckless attempt on the part of the appellants to abort the contract.

The respondent's Counsel cited a number of authorities to support his submission that a construction of the documents and a review of the documents indicate in no uncertain terms that a formal contract was not a condition. We choose only to note these cases, they are the following: *Bondwell v. Jenkins* [1878] Ch D Vol 8 70; *Bolton Partners v. Lambert* Vol 41 Ch D 295; *Shankarlal Narayandas Mundade v. New Mofussil Co. Ltd.* [1945] Vol 73 - The Law Reps. Indian Appeals p. 98; *Griffiths v. Young* [1970] 1 Ch 675; *Godecke & Anor. v. Kirwan* [1973] 1 Aus Rep 457; *Daiman Development Sdn. Bhd. v. Matthew Lui Chin Teck & Anor*. [1981] 1 MLJ p. 56. Some of these cases were already considered by the learned Judge in his grounds of judgment.

It is our finding that, in the light of all the circumstances of this case, the learned Judge had not erred either in law or fact in arriving at the finding that he did. It is also our finding that on the evidence and the exhibits it was the intention of the parties to come to a definite and complete agreement on the subject of the sale and the mere fact that a written contract had to be drawn up and executed by them did not necessarily mean that there was no legally binding and enforceable agreement. [See *Harichand v. Govind* [1923] AIR PC 47]. In our judgment a legally binding and enforceable agreement was concluded on 3 March 1976. For reasons we have stated this appeal is accordingly dismissed with costs.

Also found at [1983] 1 CLJ 233